

Remarks

Claims 1-34 are pending. Reconsideration is respectfully requested.

Claim Status

In a new ground of rejection, claims 1-34 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Harding, et al., U.S. Patent No. 6,651,188 ("Harding") in view of Watson, U.S. Patent No. 5,475,839. These rejections are respectfully traversed.

The Final Rejection Is Premature

Applicants respectfully request reconsideration of the finality of the rejection in the Office Action dated July 31, 2008. Applicants respectfully submit that the Final rejection should be withdrawn, as it is legally improper. For example, in the Action a new ground of rejection was applied against at least one non amended claim (e.g. claims 1-13, 19, and 22-34), then made Final.

MPEP §706.07(a) states:

"Under present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by applicant's *amendment of the claims* nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR 1.17(p)."

MPEP §706.07(f) (III) (M) states:

"If prosecution is to be reopened after a final Office action has been replied to, the finality of the previous Office action should be withdrawn . . . the Office action should begin with a statement to the effect: 'The finality of the Office action mailed is hereby withdrawn in view of the new ground of rejection set forth below.' Form paragraph 7.42 could be used in addition to this statement. See MPEP 706.07(d)."

The record shows evidence that: (1) the Examiner introduced a new ground of rejection; (2) the new ground of rejection was not necessitated by amendment of the claims; and (3) the new ground of rejection was not necessitated by an information disclosure statement (IDS).

The previous Office Action dated January 17, 2008 contained a 35 U.S.C. §103(a) rejection that was withdrawn in the present final Office Action dated July 31, 2008. In addition, the previous Office Action dated January 17, 2008 did not contain the 35 U.S.C. §103(a) rejection over Harding in view of Watson that is now contained in the present final Office Action dated July 31, 2008. However, Applicants' Response filed April 17, 2008 (to the Office Action dated January 17, 2008) did not contain *any* amendment to claims 1-13, 19, and 22-34. Nor did Applicants' April 17, 2008 Response include an IDS. Thus, the record itself shows the final rejection of July 31, 2008 to be *prima facie* premature.

Applicants also respectfully submit that the Office is committing prejudicial error by depriving Applicants of their administrative due process rights (e.g., timely notice of the Examiner's position and opportunity for unhindered response thereto).

In order for the new 35 U.S.C. §103(a) rejections to be legally proper, they must first be applied in a non final rejection. This situation has not yet occurred.

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Declaration Pursuant To 37 C.F.R. § 1.132

Enclosed herewith is a Declaration pursuant to 37 C.F.R. §1.132 which further establishes that the pending claims are not obvious in view of the applied art.

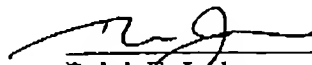
The Declaration is from a person with actual knowledge of the relevant art and the level of ordinary skill in the art at the time of the invention and subsequent filing of the application. As discussed in the Declaration, the applied art does not disclose or suggest all of the features, relationships, and steps recited in the pending claims. Thus the Action has not established a case of *prima facie* obviousness. In addition, as discussed in the Declaration, one of ordinary skill in the art at the time of the invention would not find any apparent reason, such as a teaching, suggestion, or motivation in the prior art or any other rational to modify the applied art to correspond to the pending claims. Thus the pending claims are not obvious in view of the applied art. Withdrawal of the 35 U.S.C. §103(a) rejections is respectfully requested.

Conclusion

Failure by the Examiner to remove the pending premature final rejection will be viewed as a request by the Office for Applicants to petition the Examiner's decision.

Applicants respectfully submit that this application is in condition for allowance. The undersigned is willing to discuss any aspect of the application at the Office's convenience.

Respectfully submitted,



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